Petition

81-706

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NO.

in the Supreme Court of the United States

October Term, 1981

MARIO PEREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY OF THE CRIME OF CONSPIRACY TO DISTRIBUTE MARIJUANA.

II

WHETHER THE TRIAL COURT ERRED WHEN, OVER OBJECTION, IT SUBMITTED WRITTEN INSTRUCTIONS TO THE JURY.

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Mario Perez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 15, 1981 and August 10, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reported at 648 F.2d 219 (5th Cir. 1981) and is reproduced in the Appendix hereto.

JURISDICTION

The original judgment of the Court of Appeals was entered on June 15, 1981. Petitions for rehearing and rehearing *en banc* were denied on August 10, 1981. This petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property without due process of law . . .

United States Code, Title 21, Section 841(a)(1):

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute or dispense . . . a controlled substance.

United States Code, Title 21, Section 846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or a fine . . .

STATEMENT OF THE CASE

A federal grand jury, sitting in West Palm Beach, Florida, returned a two-count indictment against the petitioner and three others,[1] alleging in Count I a conspiracy to distribute marijuana in violation of 21 *U.S.C.* §841 and in Count II, the petitioner was charged along with the others with possession with intent to distribute marijuana, in violation of 21 *U.S.C.* §841(a)(1).

Trial by jury began on January 2, 1980 and concluded January 4, 1980, with the jury returning verdicts of guilty as to all defendants. The petitioner was sentenced to three years imprisonment as to Count I and four years imprisonment as to Count II, to run consecutively. Additionally, the petitioner was ordered to pay a fine in the amount of Ten Thousand Dollars as to Count I and Ten Thousand Dollars as to Count II, for a total of Twenty Thousand Dollars.

The Fifth Circuit Court of Appeals affirmed the petitioner's convictions, but held that the special parole term imposed upon the petitioner was to be vacated. In essence, the Fifth Circuit ruled the evidence to be

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[1]Co-defendants Ruiz, Rojas and Ortiz have a petition for writ of certiorari pending before this Court, bearing Case Number 81-575.

sufficient to support the verdict of guilty of conspiracy to distribute marijuana and that although it was error to exclude the defense witness, such error was harmless. Additionally, the Fifth Circuit found no error in the submission of written jury instructions to the deliberating jury.

STATEMENT OF THE FACTS

At approximately 5:00 P.M., on February 11, 1979, Agent Don Meyers of the Palm Beach Sheriff's Office observed the vessel "Magnificent" docked in the canal at the rear of 11317 Avery Road, Palm Beach County, Florida. The vessel appeared to be riding low in the water.

Agent Meyers returned to Avery Road at approximately 7:30 P.M. that day, accompanied by Drug Enforcement Administration Agent Carter Osleber. The agents went to the back yard of a neighbor's property and from this position were able to view the vessel and portions of the back yard of the Avery Road property. It was a partially cloudy night and no lights were on in the house or the vessel, but the agents stated that they could see fairly well.

The agents testified that they observed a two-part, roller-type conveyor system leading from the boat to the rear door of the house. The petitioner was seen on the vessel, placing burlap covered bales onto the conveyor system. Agent Osleber smelled the odor of marijuana upon approaching the boat.

The agents testified that they observed Ortiz pushing the bales along the conveyor system towards Rojas,

who would push the bales to the house where Ruiz would push them inside. Ortiz, Ruiz and Rojas were wearing blue jumpsuits. The petitioners noticed the presence of the agents and ceased their activity and began to run in different directions.

The agents entered the back yard of the Avery Road property and immediately apprehended Ortiz. Rojas dived into the rear door of the house and was immediately pulled out by Agent Osleber.

Agent Osleber testified that he saw the petitioner jump off the "Magnificent" into the canal. Osleber ran to the canal and ordered the petitioner to surrender. The petitioner complied and was taken into custody. Agent Osleber looked inside the vessel, observed marijuana bales, but no other subjects.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY TO THE CRIME OF CONSPIRACY TO DISTRIBUTE MARIJUANA.

It seems almost incomprehensible how the finder of fact (jury) could have reached a verdict of guilty on the virtually non-existent evidence presented in this case as to the crime of conspiracy to distribute marijuana. The evidence against the petitioner, viewed in a light most favorable to the Government, pursuant to *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457 (1942), can be summarized simply:

The petitioner and three others, using a conveyor belt system, were apprehended while unloading bales of marijuana from a boat to a house.

The evidence does not reveal, either by statements, actions or other circumstances, that this petitioner had knowledge of or the reckless intent to be a member of a *conspiracy to distribute* the marijuana. This record can support a finding that the petitioner was in possession of the marijuana, by virtue of his efforts in unloading it, but that is as far as it goes. Evidence as to any plan or agreement *to distribute the marijuana* after it was unloaded clearly does not exist.

Where evidence in criminal cases is reasonably susceptible of many different interpretations, those cases should not be sent to the jury; such cases are appropriate instances for entry of judgments of acquittal in order to "avoid the risk that a jury may capriciously find (a defendant) guilty though there is no legally sufficient evidence of his guilt." *United States v. Haggins*, 545 F.2d 1009 (5th Cir. 1977). Moreover, where there is no evidence that a defendant *did* anything or *said* anything, then there is nothing from which a reasonable jury could infer entry into, and membership in, a conspiracy. *Roberts v. United States*, 416 F.2d 1216, 1220 (5th Cir. 1969).

The Fifth Circuit has recently had occasion to reverse convictions for conspiracy to distribute when the evidence supported only a conspiracy to import. In *United States v. Rodriguez*, 585 F.2d 1234, 1247 (5th Cir. 1978) and *United States v. Cadena*, 585 F.2d 1252, 1266 (5th Cir. 1978), the Fifth Circuit considered the sufficiency claims of defendants who were involved in a smuggling venture as captain of the freighter involved (*Cadena*) and so-called "land people" (*Rodriguez*). In *Rodriguez*, *supra*, the Court held, as it reversed a conviction for conspiracy to distribute:

> "But there is no evidence whatever that, at the time of Martin's and Smigowski's contribution to the importation scheme, they knew that a conspiracy to distribute had been formed. Although they may be charged with knowledge that such a scheme would likely be formed once the haul arrived, this is not sufficient to exclude beyond a reasonable doubt the

hypothesis that they did not then either join in it or even know of it."

As to the freighter captain, the Fifth Circuit held in *Cadena* as follows:

> "As to Cadena . . . there was no evidence that he knew of a distribution scheme when he conspired to import the marijuana. Unlike the situation presented by an ongoing enterprise, Cadena had no intent in or awareness of what plans, if any, had been reached to dispose of the marijuana once he reached these shores. *Although a conspiracy to import facilitates a conspiracy to distribute, one cannot joint [sic] a conspiracy, whether by conduct or verbal accord, unless one knows that it has in fact been concocted.*"

In the same vein, where the evidence supported only a conviction for conspiracy to possess with intent to distribute, the Fifth Circuit reversed the conviction for conspiracy to import. In *United States v. Soto*, 591 F.2d 1091, 1104 (5th Cir. 1979), the Fifth Circuit held:

> "Count I charged the appellants with conspiring to import marijuana into the United States under 21 U.S.C. §963. Count IV charged them with the substantive offense of importation under 21 U.S.C. §§952(a) and 960(a)(1) and 18 U.S.C. §2. As to these charges, the Government's case is too weak to support the conviction of any of the appellants. There is no evidence that the "Captain Salty" ever went outside the territorial waters of the United States or

> **met with any other craft that had. The only evidence which even suggests that the contraband was imported is the size of the shrimp boat and the quantity of marijuana in the cache found to have been transported by the "Captain Salty." The speculation required to get from those facts to convictions on the two importation counts does not provide proper support for the verdicts."**

The evidence does not disclose that the petitioner was anything more than a mere laborer, lending his strong back to the unloading process. The evidence failed to demonstrate that the petitioner had any interests in the proceeds of an already arranged distribution scheme or was to play any part in distributing the marijuana. For that matter, the Government failed to show that any distribution scheme existed, or was even contemplated, during the pertinent time period. Accordingly, there is simply no evidence, let alone substantial evidence, to support the jury's verdict of guilty for conspiracy to distribute marijuana. *United States v. Malatesta*, 590 F.2d 1379 (5th Cir. 1979).

Moreover, in rejecting the petitioner's challenge to the sufficiency of the evidence to support his conviction for conspiracy to distribute marijuana, the Fifth Circuit relied upon *United States v. Mann*, 615 F.2d 668 (5th Cir. 1980). The Fifth Circuit found *Mann* to be "a parallel case where the defendants were similarly charged with conspiracy to distribute." This statement is mistaken since the defendants in *Mann* were charged with conspiracy to possess marijuana with the intent to distribute and the Court found from the amount of

contraband seized the requisite intent to support the conviction. This mistake forcefully underscores the precise point we are making. That is, the crime of conspiracy to possess with intent to distribute is one step removed and is distinct from the crime of conspiracy to distribute, requiring different proofs.

So, then, we say that if the petitioner was charged with conspiracy to possess with the intent to distribute, the facts would support a conviction. But he was not. A search of the record for evidence to support his conviction for conspiracy to distribute reveals that *beyond the amount of the marijuana involved*, there is none. Since the amount involved leads only to a proper inference that he intended to distribute, and nothing more, the conspiracy count challenged here must fall. Otherwise, the finding of an intent to distribute is the equivalent of a conspiracy to distribute without the required elements of an existing agreement and knowledge of it.

II.

THE TRIAL COURT ERRED WHEN, OVER OBJECTION, IT SUBMITTED WRITTEN INSTRUCTIONS TO THE JURY.

Over the petitioner's objection, the trial court submitted written instructions to the jury. The Fifth Circuit Court of Appeals has twice expressed disapproval of this practice. *United States v. Hooper*, 575 F.2d 496 (5th Cir. 1979), *cert. denied*, 99 S.Ct. 256 (1979); *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977). The submission of written instructions to the jury was condemned as "condusive to dissection of the charge by the jury and overemphasis of isolated parts rather than consideration of the charge as a whole." *Schilleci*, *supra*, at 526.

Although the submission of written jury instructions has been found not to constitute an abuse of discretion where the litigation is complex, *see United States v. Standard Oil Company*, 316 F.2d 884 (7th Cir. 1963), the procedure was especially prejudicial here, where the jury heard argument, testimony and instructions comprising less than 190 pages of transcript. This Court should grant certiorari to review the Fifth Circuit's decision so that a uniform procedure for the equitable submission of jury instructions can be set.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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/s/ Joseph Mincberg
JOSEPH MINCBERG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served, by mail, upon The Solicitor General, Department of Justice, Washington, D.C. 20530; KAREN L. ATKINSON, Assistant United States Attorney, 701 Clematis Street, West Palm Beach, Florida 33401; and HENRY ROTHBLATT, ESQ., Attorney for petitioners, 155 South Miami Avenue, Miami, Florida 33130, this 10th day of October, 1981.

/s/ Joseph Mincberg
JOSEPH MINCBERG

Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mario PEREZ, Carlos Ruiz,
Rigoberto Rojas and Armando Ortiz,
Defendants-Appellants,

No. 80-5100.

United States Court of Appeals,
Fifth Circuit.
Unit B

June 15, 1981.

Defendants were convicted before the United States District Court for the Southern District of Florida, James C. Paine, J., of conspiracy to distribute marijuana and possession with intent to distribute marijuana, and they appealed. The Court of Appeals, Dyer, Circuit Judge, held that: (1) special parole term imposed on one defendant for conspiracy charge was required to be vacated; (2) evidence supported conspiracy conviction; (3) although trial court should have imposed a lesser sanction than witness preclusion for counsel's violation of standing discovery order failure to do so was harmless error beyond a reasonable doubt; (4) severance motion, as requested after Government rested its case, was untimely where defendant knew of basis therefore four months prior to trial; and (5) guns discovered in closet in which one defendant had secreted himself were relevant and it was not prejudicial for Government to fail to disclose that house belonged to a codefendant.

Vacated in part and affirmed in part.

Fay, Circuit Judge, filed specially concurring opinion.

1. Conspiracy —51

Special parole term imposed for conspiracy to distribute marijuana was required to be vacated as defendant received consecutive sentences of two-year special parole term on such count as well as on conviction of possession with intent to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U.S.C.A. §§841(a)(1), 846.

2. Conspiracy —47(2)

Intentional participation in a criminal conspiracy need not be proved by direct evidence but may be inferred from a development and a collocation of circumstances. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

3. Conspiracy —47(12)

Evidence was sufficient to support conviction of conspiracy to distribute marijuana, in that during evening hours the defendants, in dress of the day, were observed offloading 18,900 pounds of marijuana from a vessel in a sophisticated operation utilizing a conveyor belt from vessel to adjacent house, when one defendant gave the alarm that they were being watched three defendants attempted to flee, while another jumped into canal. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

4. Criminal Law —1172.1(5)

Although trial court should not have submitted written instructions to jury after having charged the jury to consider the charges as a whole reversal was not required absent showing of prejudice.

5. Criminal Law —627.8(6), 1166(1)

Defense counsel violated standing discovery order by waiting from December 19 to December 30 to disclose doctor's statement to the Government, particularly with holiday intervening before trial on January 3 and although trial court should have imposed a lesser sanction than preclusion of the witness, failure to do so was harmless error beyond a reasonable doubt as case was not a close one and doctor's proffered testimony was equivocal, i.e., that defendant's back was not always dysfunctional, and defendant had been observed lifting and placing many bales of marijuana on conveyor belt and had jumped into canal and started to swim away in escape attempt. Fed. Rules Cr.Proc. Rule 16(d)(2), 18 U.S.C.A.; U.S.C.A.Const. Amends. 5, 6.

6. Criminal Law —622(2)

Denial of severance motion, which was not made until Government rested its case and which was sought to obtain allegedly material exculpatory testimony of codefendant, was not abuse of discretion where defendant knew of the exculpatory testimony four months in advance of trial and did not seek severance until after acquittal motion had been denied and defendant failed to show that there was a likelihood that codefendant would testify if severance were granted.

7. Criminal Law —404(4)

Two loaded weapons discovered on shelf of closet in which one defendant had concealed himself were relevant to the issues raised in prosecution for conspiracy to distribute marijuana and possession with intent to distribute 18,900 pounds of marijuana where defendant was dressed in same colored jumpsuit as codefendants who were actively unloading marijuana and was observed reaching for the shelf above his head where the guns were located; agents were entitled to be apprehensive about their own safety and, also, there was no prejudice because of Government's failure to inform jury that house belonged to a codefendant. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§401(a)(1), 406, 21 U.S.C.A. §§841(a)(1), 846.

Appeals from the United States District Court for the Southern District of Florida.

Before DYER, TJOFLAT and FAY, Circuit Judges.

DYER, Circuit Judge:

Defendants appeal their convictions of conspiracy to distribute marijuana, 21 U.S.C.§846, and possession with intent to distribute marijuana, 21 U.S.C. §841(a)(1). We vacate the special parole term imposed on Perez under count one of the indictment and in all other respects we affirm.

On February 11, 1979, agent Meyers of the Palm Beach Florida Sheriffs office was conducting surveillance

at 11317 Avery Road in North Palm Beach. A vessel, The Magnificent, about sixty feet in length, was docked in a canal at the rear of the residence. She was riding low in the water.

About seven-thirty that evening Meyers and agent Osleber of the Drug Enforcement Administration returned to the residence and Osleber smelled marijuana. Both agents heard a whirring noise and proceeded through an adjacent yard where they could view the back yard of the Avery Road residence. With a full moon lighting the area the agents saw a conveyor system running from the window of the vessel to the house. It was equipped with rollers and indoor-outdoor carpeting. The agents saw Perez at the window of the vessel passing burlap bales of marijuana from the vessel to the conveyor system. Ortiz was standing next to the conveyor system pushing the bales to Rojas, who, in turn, pushed the bales to Ruiz, who pushed the bales inside the house. All three men were wearing identical dark blue, short sleeved jumpsuits.

After watching the offloading operation for a few minutes Osleber made a remark to Meyers which was overheard by Perez. Perez immediately indicated to the others to be quiet and the men started to crawl away from the conveyor system.

There was a large clothesline in the backyard with sheets draped over it which screened the conveyor system. The agents appeared and announced that they were law enforcement officers and that everyone was under arrest. Ortiz, who started to run away, was seized and arrested. Meyers held him in custody. Rojas was seen crawling along the sidewalk and was diving over

bale of marijuana in the doorway of the house. Agent Osleber dragged Rojas back to agent Meyers who took custody of him. Osleber then saw Perez dive off the front of the vessel into the canal. As he was swimming away, Osleber pointed his rifle at Perez and ordered him back.

Agent Meyers saw Ruiz run into the house. It was dark except for a green chemical light that had been dropped on the floor. The agents heard noises coming from a bedroom, proceeded there, and announced their presence, but no one emerged. The agents saw Ruiz through a partially opened closet door, crouching and reaching toward the shelf above his head on which was a .30 caliber cut down carbine and a .357 magnum pistol, both loaded. Ruiz was wearing the same blue jumpsuit.

At the time of seizure sixteen bales of marijuana were on the conveyor system, one hundred and one bales were stacked in the living room, and three hundred and ten bales were still on the vessel. The total weight of all of the marijuana was 18,900 pounds.

All of the defendants concede on appeal that there was sufficient evidence to sustain their convictions under count two of the indictment, possession with intent to distribute marijuana, 21 U.S.C. §841(a)(1). They collectively argue, however, that there was insufficient evidence to support a conviction for the conspiracy charged in count one, and further that it was error for the district court to submit a written copy of its charge to the jury. Perez contends that it was error for the court to exclude his expert witness because Perez' failure to abide by the standing discovery rules, and

further that the parole term imposed upon him under count one is invalid. Ruiz asserts that it was error to admit in evidence the weapons found on the closet shelf under which he was hiding, and further that his motion for severance should have been granted.

[1] At the outset we agree that Perez' special parole term imposed under count one must be vacated because he received consecutive sentences of two years special parole term on each count. In *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) the Court held that a special parole term may not be imposed for violations of 21 U.S.C. §846. The concurrent sentence doctrine, *United States v. Warren*, 612 F.2d 887, 891-896, (5th Cir. 1980) (*en banc*) makes it unnecessary for us to consider the concurrent special parole term imposed on Ruiz, Rojas and Ortiz.

All of the defendants strongly argue that there was insufficient evidence to prove that they had the required intent to become a member of a conspiracy to distribute the marijuana. While they concede that they were in possession of it, they submit that there is no evidence of a plan to distribute it. We are unpersuaded. The defendants start with the sound premise that there must be proof beyond a reasonable doubt that a conspiracy existed, that they knew it, and with that knowledge voluntarily joined it. *United States v. Rodriguez*, 585 F.2d 1234 (5th Cir. 1978). They argue that on review we must find substantial evidence of the conspiracy as required by *United States v. Malatesta*, 590 F.2d 1379 (5th Cir. 1979). But they reach an unsound conclusion when they apply the facts to the premise.

[2, 3] Intentional participation in a criminal conspiracy need not be proved by direct evidence but may be inferred "from a development and a collocation of circumstances". *United States v. Harbin*, 601 F.2d 773 (5th Cir. 1979). Here we have the offloading of 18,900 pounds of marijuana from "The Magnificent" in a sophisticated operation utilizing a conveyor belt from the vessel to the house. Three of the defendants along the belt were dressed in the uniform of the day—dark blue jumpsuits. When Perez gave the alarm that they were being watched the three defendants attempted to flee, while Perez jumped overboard into the canal. The evidence of complicity is overwhelming. The defendants could not, even if they were chain smokers, personally consume this quantity of marijuana in their lifetime. It would be sheer sophistry to say that the defendants had not agreed to distribute the marijuana. In a parallel case where the defendants were similarly charged with conspiracy to distribute, *United States v. Mann*, 615 F.2d 668 (5th Cir. 1980), the defendants were apprehended with over 22,500 pounds of marijuana in their possession "far too much for the personal consumption of four individuals. Having determined that defendants planned to import their cargo the jury was entitled to infer from the facts before it that some plan had been made for its disposition. As we have previously noted '[t]he very size of a . . . cache can be sufficient to show intent to distribute . . .' *United States v. Rodriguez*, 585 F.2d 1234, 1236 (5th Cir. 1978) aff'd 612 F.2d 906 (5th Cir. 1980) (*en banc*); *United States v. Perry*, 480 F.2d 147 (5th Cir. 1973); *United States v. Mather*, 465 F.2d 1035 (5th Cir.), *cert. denied*, 409 U.S. 1085, 93 S.Ct. 685, 34 L.Ed.2d 672 (1972)." The factual picture painted here fits precisely into the frame of a conspiracy to distribute. Viewing the evidence in the light most favorable to the

government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and accepting all reasonable inferences that support the jury verdict, *United States v. Becker*, 569 F.2d 951 (5th Cir. 1978), we find substantial evidence that sustains the jury's conclusion that the defendants entered into a conspiracy to distribute marijuana.

[4] The defendants next argue that the district court, over their objections, submitted written instructions to the jury after having charged the jury to consider the charges as a whole. While we have condemned the practice, there is no showing that any prejudice resulted because of the submission of written instructions. *United States v. Hooper*, 575 F.2d 496 (5th Cir. 1978) is a full answer to the contention here made. There we said "The final ground of error put forth by defendant is that the district court incorrectly provided the jury with a written copy of the jury charges. In *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977), this court expressed disapproval of the practice of furnishing the jury with written copies of the jury charge, but stated, however, that the practice was not error in itself. *Id.* at 526. As none of the circumstances that created the risk of prejudice in *Schilleci* is present in this case we reject the defendants' contention." (footnote ommitted).

[5] Perez assigns error in the preclusion of his defense witness for a violation of a standing discovery order.[1] He argues that the action taken by the court

[1]The standing discovery order provides in pertinent part that it shall be continuing duty for counsel for both sides to immediately reveal to opposing counsel all reports of physical or mental examinations.

under Rule 16(d)(2) of the Federal Rules of Criminal Procedure collides with his Fifth Amendment right to due process and his Sixth Amendment right to compulsory attendance of witnesses.

Doctor Antonio Rivero-Setien examined Perez on December 19, 1979. Four days before the trial date, January 3, 1980, the doctor's report was shown to the government. When the doctor was called as a witness by Perez the government's objection to his testimony was sustained. The proferred testimony was that his examination of Perez disclosed that he suffered from "acute back syndrome" and as a result Perez was not able to lift a weight of thirty to fifty pounds. However, he equivocated by saying that sometimes Perez had no pain, that "If at that time he was without pain, he would be able to swim." And again, sometimes he has no pain, is in good condition, and does not need crutches. Other times he has been in worse condition, and sometimes moving in the bed suddenly, and so forth, and so his condition can worsen, sometimes."

We entertain no doubt but that Perez' counsel was in violation of the discovery order by waiting from December 19 to December 30, 1979, to disclose the doctor's statement to the government, particularly with the New Years holiday intervening before trial on January 3, 1980. Thus it was within the sound discretion of the district court to mete out appropriate relief. *United States v. Bockius*, 564 F.2d 1193 (5th Cir. 1977); *United States v. Bullock*, 551 F.2d 1377 (5th Cir. 1977); *Gevinson v. United States*, 358 F.2d 761 (5th Cir. 1966); *United States v. Saitta*, 443 F.2d 830 (5th Cir.), *cert. denied*, 404 U.S. 938, 92 S.Ct. 269, 30 L.Ed.2d 250 (1971). But "the

compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *United States v. Davis*, 639 F.2d 239 at 243 (5th Cir. 1981).

It is self evident, however, that this was not a close case. The evidence of guilt was formidable and the doctor's proferred testimony was equivocal—that Perez' back was not always disfunctional. Perez was observed lifting and placing on the conveyor belt bale after bale of marijuana. He jumped into the canal and started to swim away in an attempt to escape. We conclude that although the court should have imposed a lesser sanction than the preclusion of the witness, on the facts and in the circumstances of this case, the failure to do so was harmless error beyond a reasonable doubt. *United States v. Arcentales*, 532 F.2d 1046 (5th Cir. 1976).

[6] Ruiz asserts error in the denial of his motion for severance arguing that it deprived him of material exculpatory testimony of his codefendant Rojas. At the motion to suppress hearing held on September 4, 1979, prior to the time of trial in January 1980, Ruiz called Rojas as a witness. The magistrate advised counsel that any testimony offered by any of the defendants could not be used against them at trial except as impeachment. Rojas then testified that when Ruiz arrived at the house he looked and acted sick and went to bed shortly thereafter.

No written or oral motion for severance was made or filed by Ruiz at anytime before the government rested its case. Then for the first time Ruiz' counsel

moved for a judgment of acquittal and for a severance. Ruiz called Rojas as a witness outside the presence of the jury and Rojas stated his intent to invoke his Fifth Amendment rights with regard to all questions put to him concerning the crime. Ruiz then argued that he should be granted a severance or alternatively should be allowed to introduce the former testimony of Rojas. The district court denied the motions.[2] We find no abuse of discretion in the trial court's ruling.

In the seminal case of *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970), we pointed out several areas of inquiry which a trial court should pursue when it is presented with a motion to sever based on the desire to offer exculpatory testimony of a codefendant, among which were "[t]o what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the codefendant will testify." Further, "[w]hat are the demands of effective judicial administration and economy of judicial effort? Related to this is the timeliness in raising the question of severance" (footnote omitted). Addressing these inquiries in reverse order we find that there was a failure to timely present the motion. Ruiz knew four months in advance of the trial what Rojas testified to on the motion to suppress, yet no motion for severance was made until after the government rested and Ruiz' motion for acquittal had been denied. The motion to sever at this late date was untimely. *United States v. Metz*, 608 F.2d 147 (5th Cir. 1979). *Kolod v. United States*, 371 F.2d 983 (10th Cir. 1967). Moreover, Ruiz did not meet the burden of showing that there was a likelihood that Rojas would testify if

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[2]Ruiz did not assign as error on appeal the exclusion of the former testimony of Rojas.

Ruiz' motion for a severance was granted. "The court is not required to sever when the possibility of the codefendant's testimony is merely colorable or there is no showing than it is anything more than a gleam of possibility in the defendant's eye." *Byrd, supra* at 1022. The limited testimony of Rojas at the suppression hearing after a promise of immunity from its affirmative use, especially after Rojas' claim of his Fifth Amendment privilege outside the presence of the jury at the time of trial is a strong indication that Rojas would not have taken the stand if Ruiz had been granted a separate trial.

In a well documented and exhaustive opinion by Judge Thornberry in *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976) it was emphasized that "the grant or denial of a motion for severance rests in the sound discretion of the trial judge. Consistent with this discretion, which is necessarily wide, appellants carry a heavy burden to show the denial of their motions for severance also denied them a fair trial. Absent an abuse of discretion, the ruling of the trial judge will not be disturbed on appeal." We find no abuse of discretion here.

[7] Finally Ruiz contends that the two loaded weapons introduced into evidence against him had, at best, only slightly probative value which was outweighed by their potential prejudice. He argues that prejudice arose both because the government failed to inform the jury that the house belonged to codefendant Perez and because of the inflammatory nature of the weapons themselves. The agents saw Ruiz in a blue jumpsuit (similar to those worn by the others), crouching in the closet and reaching for the shelf above his head where

the two loaded guns were located. We are unimpressed with the argument that given these facts it could have made a difference to the jury to know that the house was owned by Perez, not Ruiz. That is beside the point—the point is that Ruiz was there and reaching toward the weapons.

The defendants were unloading 18,900 pounds of marijuana. It is certainly fair to assume that anyone engaging in a transaction of this magnitude would take steps against having the contraband or the purchase money stolen. *United States v. Pentado*, 463 F.2d 355 (5th Cir. 1972). Moreover, the agents were entitled, under the circumstances, to be apprehensive about their own safety. As the Ninth Circuit said in *United States v. Kearney*, 560 F.2d 1358 (9th Cir. 1977), "[p]ossession of a firearm demonstrates the likelihood that a defendant took steps to prevent contraband or money from being stolen." We endorse the Second Circuit's observation that "[e]xperience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales [which were also found in the closet], glassine bags, cutting equipment, and other narcotic equipment." *United States v. Wiener*, 534 F.2d 15 (2nd Cir. 1976).

The guns were relevant to the issues upon which Ruiz was tried and the district court did not abuse its discretion in holding that their probative weight was not overbalanced by the inflammatory tendency of the guns as evidence. *United States v. Ashley*, 555 F.2d 462 (5th Cir. 1977). See *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (*en banc*).

The special parole term imposed on Perez under count one of the indictment is vacated. The judgments of conviction are, in all other respects, AFFIRMED.

FAY, Circuit Judge, specially concurring:

I agree wholeheartedly with Judge Dyer's opinion for the court but wish to add this statement regarding the submission of the trial court's charges to the jury. While we are bound by *Schilleci* as we pointed out in *United States v. Johnson*, 558 F.2d 744 (5th Cir. 1977), that opinion must be read in light of its very peculiar fact situation and the combination of errors requiring reversal. As noted by Judge Dyer, the language in *Schilleci* states that the practice is not error in itself. *Schilleci* does express disapproval of the practice of furnishing the jury with written copies of the jury charge. That precise question has never been considered by our court *en banc*.

Personally, I feel the practice of furnishing a copy of the court's instructions to the jury is both sound and proper. Additionally, I seriously doubt that the criticism of the practice found in *Schilleci* represents the current thinking of most trial and appellate judges within our circuit.

[FILED AUG 10 1981]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-5100

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARIO PEREZ, CARLOS RUIZ,
RIGOBERTO ROJAS and ARMANDO ORTIZ,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

(Opinion June 15, 5 Cir., 1981, ____F.2d____).

(August 10, 1981)

Before DYER, TJOFLAT and FAY, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative

Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit is in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

[illegible]
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND
LOCAL RULE 17 FOR STAY
OF THE MANDATE